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No. 06-26

Supreme Court, U.S.
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In The
Supreme Court of the United States

WELDON ANGELOS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

REPLY BRIEF FOR THE PETITIONER

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QUESTIONS PRESENTED

1. Whether this Court's summary disposition in *Hutto v. Davis*, 454 U.S. 370 (1982) (*per curiam*), stands as a precedential bar to a lower court otherwise concluding that a sentence violates the Eighth Amendment's ban on cruel and unusual punishment under the *Solem-Harmelin* analysis articulated after *Davis* and in opinions of the Court rendered after plenary review, full briefing, and oral argument.

2. Whether it violates the Eighth Amendment to impose a mandatory 55-year sentence on a first-time offender for possessing firearms in connection with selling small amounts of marijuana, where no violence or injury was caused or threatened, where far more serious federal offenses would receive lesser punishment, and where no other jurisdiction would impose such a severe sentence.

TABLE OF CONTENTS

		Page
QUESTIONS PRESENTED		i
I.	The Facts Are Those As Found By The District Court	2
II.	The Precedential Value Of *Hutto v. Davis* And *Per Curiam* Opinions Generally Is The Key Issue In This Case	6
III.	The Government's Efforts To Avoid *Davis* Fall Flat	8

TABLE OF AUTHORITIES

Page

CASES

Buford v. United States, 532 U.S. 59 (2001) 4
Campbell v. Wood, 20 F.3d 1050 (9th Cir. 1994) 7
Easley v. Cromartie, 532 U.S. 234 (2001) 4
Ewing v. California, 538 U.S. 11 (2003) 5, 8
Faretta v. California, 422 U.S. 806 (1975) 5
Georgia v. Ashcroft, 539 U.S. 461 (2003) 4
Harmelin v. Michigan, 501 U.S. 957 (1991) 5, 6, 8, 9
Harris v. Rivera, 454 U.S. 339 (1981) 7
Henderson v. Norris, 258 F.3d 706 (8th Cir. 2001) 9
Herring v. New York, 422 U.S. 853 (1975) 5
Hutto v. Davis, 454 U.S. 370 (1982) 1, 6, 7, 8, 10
In re Blodgett, 502 U.S. 236 (1992) 7
In re Kandu, 315 B.R. 123 (W.D. Wash. 2004) 7
Koon v. United States, 518 U.S. 81 (1996) 4
Lehman v. Trout, 465 U.S. 1056 (1984) 7
Lockyer v. Andrade, 538 U.S. 63 (2003) 8
Mickens v. Taylor, 535 U.S. 162 (2002) 4
Rummel v. Estelle, 445 U.S. 263 (1980) 8
Solem v. Helm, 463 U.S. 277 (1983) 5, 6
Townsend v. Burke, 334 U.S. 736 (1948) 5
United States v. Arrington, 159 F.3d 1069 (7th Cir. 1998) 9
United States v. Arvizu, 534 U.S. 266 (2002) 4

TABLE OF AUTHORITIES – Continued

Page

United States v. Beverly, 369 F.3d 516 (6th Cir. 2004) 9

United States v. Booker, 543 U.S. 220 (2005) 4, 5

United States v. Harris, 154 F.3d 1082 (9th Cir. 1998) 9

United States v. Hungerford, No. 05-30500, 2006 WL 2923703 (9th Cir. Oct. 13, 2006) 9, 10

United States v. Johnson, 327 U.S. 106 (1946) 4

United States v. Magallanez, 408 F.3d 672 (10th Cir. 2005) 3

United States v. Marshall, 411 F.3d 891 (8th Cir. 2005) 3

United States v. Serrata, 425 F.3d 886 (10th Cir. 2005) 3

United States v. Tucker, 404 U.S. 443 (1972) 4, 5

Yopps v. State, 228 Md. 204 (1962) 5

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. CONST. amend. VIII ..... *passim*

21 U.S.C. § 841(b)(1) 9

COLO. REV. STAT. § 18-18-406(1) 8

22 ME. REV. STAT. § 2383(1)(A) 8

NEB. REV. STAT. § 28-416(13)(a) 9

N.Y. PENAL LAW § 221.05 9

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

Douglas Berman, "Tenth Circuit affirms 55-year mandatory minimum sentence in *Angelos*," Sentencing Law and Policy, Jan. 10, 2006 5

Hon. Anthony M. Kennedy, Associate Justice, Supreme Court of the United States, Speech at the American Bar Association Annual Meeting (Aug. 9, 2003) 10

REPLY BRIEF FOR PETITIONER

The Government's response, requested by this Court, recommends that the Supreme Court deny review of the petition. But the arguments the Government makes in support of its position, and perhaps more telling, the issues it avoids or attempts to diffuse, highlight the need for this Court's review.

First, the Government spends the majority of its brief relaying its version of the facts in this case, largely as presented in its brief before the Tenth Circuit Court of Appeals. It does not once rely on the facts as found by the District Court, which were never found to be clearly erroneous by the appellate panel, and which, not surprisingly, tell a far different story. This is an obvious effort by the Government to distract the Court from the real issues presented by this case.

Second, the Government confuses what is required for this Court's review and, in particular, what is required for the Court to reach the key question presented by this case, the precedential effect of *per curiam* opinions such as *Hutto v. Davis*, 454 U.S. 370 (1982). The Government does not deny that, in reaching the conclusion that there was no Eighth Amendment violation here, both the District Court and the appellate panel relied on *Davis*. *See* Br. in Opp. 20-21. In fact, as further described below, when the Eighth Amendment analysis is done as the Court's precedents dictate, this case turns on the continuing effect of *Davis*. But rather than deny that there is significant uncertainty with respect to the precedential value of *per curiam* opinions like *Davis* or make any argument that this question is otherwise unworthy of the Court's attention, the Government asserts that *Davis* just isn't that important to this particular case. Such an approach is off the mark and does nothing to counter Petitioner's arguments that this case presents significant issues that are in need of the Court's review. Petitioner therefore respectfully requests that the writ of certiorari be granted.

I. The Facts Are Those As Found By The District Court.

Instead of responding to the questions raised in the petition on their merits, the majority of the Government's response is dedicated to rehashing factual disputes that were resolved in the District Court. Rather than explain its dissatisfaction with the District Court's resolution of those issues, the Government repeatedly cites *its own brief* before the Court of Appeals as a source of facts. *See* Br. in Opp. 2-6 (citing Gov't C.A. Br.). The Government never once acknowledges that it is repeating its own version of the facts which were not found by the District Court. The Court should reject outright this questionable tactic as inappropriate and misguided.[1]

In addition, the Government's response also recites supposed factual findings of the appellate panel. While the legal question of whether a sentence violated the Eighth

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[1] Were this an appropriate approach to presenting the facts before the Supreme Court, Petitioner could cite his own brief as a means to impeach the factual basis for nearly all of his sentence. For instance, the testimony of confidential informant Ronnie Lazalde – that Petitioner possessed a firearm during two controlled buys – was directly contradicted by the testimony of other government witnesses, police reports, and surveillance photos. This was exceedingly important because Lazalde was the only person to claim that Petitioner possessed a firearm on these two occasions, which, in turn, served as the basis for 50 years of Petitioner's 55-year sentence. (Ironically, the Government's brief in the Court of Appeals acknowledges that "[a]n informant, like Lazalde, does not have ... a professional duty" to provide accurate information. Gov't C.A. Br. 104-05.) The initial police reports on the debriefing of Lazalde contained no reference to Petitioner's possessing a firearm during the incidents; instead, a single entry alleging firearms possession was added to the police reports several months later. In addition, Lazalde had a long criminal record (unlike Petitioner), and at the time of the controlled buys, Lazalde had drug sales and related gun possession charges pending against him (i.e., virtually identical charges as those filed against Petitioner). In the end, however, Lazalde's charges were not just reduced via plea bargain, but instead totally disappeared from the criminal justice system altogether. *See, e.g.*, Def. C.A. Br. 82-86; Def. C.A. Reply 25-28; Def. C.A. Reh'g Pet. 6-7. Unlike the Government, however, Petitioner accepts the factual findings of the District Court, focusing this Court's attention on critical legal issues in the petition for writ of certiorari.

Amendment is subject to *de novo* review on appeal, a trial court's findings of fact are entitled to due deference and should be set aside only when clearly erroneous.[2] In the present case, the District Court made factual findings that served as the basis for its determination that the underlying sentence was grossly disproportionate. Among other things, the District Court found that: Mr. Angelos was a 24-year-old first offender and not a recidivist; on three occasions, Mr. Angelos sold small amounts of marijuana for several hundred dollars; and he was a successful music executive. Pet. App. 32-37, 69-74, 89-92.

The appellate panel never held that the District Court's factual findings were clearly erroneous, nor did it determine that the factual findings required a different legal outcome. Instead, the panel appears to have revised the trial court's findings in significant ways, *sub silentio*, without concluding first that the District Court had erred.[3] In particular, the panel concluded that: Mr. Angelos's status as a first-time offender "appears to have been the result of good fortune rather than Angelos's lack of involvement in criminal activity"; "Angelos was a known gang member who had long used and sold illicit drugs," and he "was a mid-to-high drug dealer who purchased and in turn sold large quantities of marijuana"; and he was not successful in the music

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[2] *See, e.g., United States v. Serrata*, 425 F.3d 886, 906 (10th Cir. 2005) (holding that district court's factual findings in sentencing are reviewed only for clear error). *See also United States v. Marshall*, 411 F.3d 891, 895 (8th Cir. 2005) ("It is well established that in sentencing matters a district court's assessment of witness credibility is quintessentially a judgment call and virtually unassailable on appeal."); *United States v. Magallanez*, 408 F.3d 672, 682 (10th Cir. 2005) ("It is not the role of an appellate court to consider the credibility of the witnesses or weigh the conflicting evidence, as these matters are within the exclusive province of the jury.").

[3] At one point, the panel asserted that it "carefully review[ed] the record on appeal, including the trial transcript." Pet. App. 15. While it may have examined the incomplete record before it, the panel simply could not have reviewed the trial transcript as claimed: The trial was conducted over the course of seven days, and only extracts of the transcript were part of the record on appeal.

industry and profited only from drug dealing. Pet. App. 26-27.

The appellate panel's actions were clearly inconsistent with this Court's precedents holding that reviewing courts have "no business disturbing the District Court's [factual findings] 'simply because we would have decided the case differently.'" *Georgia v. Ashcroft*, 539 U.S. 461, 498 (2003) (*quoting Easley v. Cromartie*, 532 U.S. 234, 242 (2001)). Given "the District Court's superior access to the evidence and the well-recognized inability of reviewing courts to reconstruct what happened in the courtroom," *United States v. Arvizu*, 534 U.S. 266, 276 (2002), appellate courts must "refrain from reviewing findings of fact which have evidence to support them." *United States v. Johnson*, 327 U.S. 106, 113 (1946).[4] And when it comes to issues of fact for sentencing, this Court has held that "[d]istrict courts have an institutional advantage over appellate courts." *Koon v. United States*, 518 U.S. 81, 98 (1996). In the present case, the appellate panel did not find the District Court's factual findings to be "wholly unsupported by the evidence" and instead simply substituted its own facts, despite this Court's admonition that "it should never do so where it does not clearly appear that the findings are not supported by any evidence." *Johnson*, 327 U.S. at 111-12.

In addition to conflicting with this Court's precedent on the proper role of a reviewing court, the appellate panel's actions raise difficult constitutional questions.[5] They also

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[4] *See, e.g., Mickens v. Taylor*, 535 U.S. 162, 177 (2002) (Kennedy, J., concurring) ("Our role is to defer to the District Court's factual findings unless we can conclude they are clearly erroneous."). *See also Buford v. United States*, 532 U.S. 59, 64-66 (2001) (adopting deferential standard of review for district court sentencing decisions); *Koon*, 518 U.S. at 96-100 (1996) (similar).

[5] Specifically, the panel may have infringed upon Petitioner's Fifth and Sixth Amendment rights. While it is true that a trial judge generally has discretion "in determining what sentence to impose" as well as "the kind of information he may consider, or the source from which it may come," *United States v. Tucker*, 404 U.S. 443, 446 (1972), *see also United States v. Booker*, 543 U.S. 220, 264-65 (2005) (discussing district court

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create serious confusion regarding the proper application of this Court's Eighth Amendment jurisprudence. Since the Court first articulated its three-part analysis more than twenty years ago, it has never used unproven facts in applying this test. *See Ewing v. California*, 538 U.S. 11, 28-31 (2003); *Harmelin v. Michigan*, 501 U.S. 957, 1001-05 (1991) (Kennedy, J., concurring); *Solem v. Helm*, 463 U.S. 277, 295-303 (1983). Yet the appellate panel analyzed the first factor of the *Solem-Harmelin* test – whether the sentence is grossly disproportionate to the underlying offenses – based not on current or prior crimes of conviction but on mere speculation and unproven allegations.[6] Among other things, the appellate panel has essentially invented a new category of offender, which the Government apparently approves: the first-time offender as "the result of good fortune," who thus can be viewed as a recidivist. *See* Pet. App. 26; Br. in Opp. 13, 19.

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discretion in sentencing); a defendant's sentence cannot be based upon "misinformation of constitutional magnitude," such as "'assumptions concerning his criminal record which were materially untrue.'" *Tucker*, 404 U.S. at 447 (*quoting Townsend v. Burke*, 334 U.S. 736, [illegible] (1948)). Likewise, a defendant's right to counsel "'necessarily includes his right to have his counsel make a proper argument on the evidence and the applicable law in his favor, however simple, clear, unimpeached, and conclusive the evidence may seem.'" *Herring v. New York*, 422 U.S. 853, 860 (1975) (*quoting Yopps v. State*, 228 Md. 204, 207 (1962)). The Sixth Amendment thus "constitutionalizes the right in an adversary criminal trial to make a defense as we know it," *Faretta v. California*, 422 U.S. 806, 819 (1975); and "the opportunity to participate fully and fairly in the adversary factfinding process." *Herring*, 422 U.S. at 858. There could even be a latent Sixth Amendment jury-trial right problem created by the panel's inappropriate fact-finding. *See, e.g.*, *Booker*, 543 U.S. 220, and cases cited therein.

[6] The unprecedented nature of the panel's methodology has not gone unnoticed by legal commentators. For instance, it was chided by one of the nation's leading scholars of federal sentencing: "In the Tenth Circuit, apparently a defendant's reputation, and not simply the crimes of conviction, are central to an analysis of the Eighth Amendment's prohibition on cruel and unusual punishments." Prof. Douglas Berman, "Tenth Circuit affirms 55-year mandatory minimum sentence in *Angelos*," Sentencing Law and Policy, Jan. 10, 2006, *available at* http://sentencing.typepad.com/sentencing_law_and_policy/2006/01/angelos_55year_.html.

One might anticipate, however, a substantially different response to the natural corollary category: the recidivist as "the result of *bad* fortune," who therefore should be treated as a first-time offender. But, of course, neither category actually exists. The appellate panel's unfounded approach cannot be squared with this Court's Eighth Amendment jurisprudence and its examination of the constitutionality of a sentence based solely on the current or prior convictions.

Accordingly, the Court should reject the self-styled facts in the Government's response and the inappropriate factual findings in the appellate panel's opinion. The facts found by the District Court are controlling and are the factual findings currently before the Court. This is the approach taken not just by Petitioner but also Amici Curiae, composed of more than twelve dozen former federal judges, federal prosecutors, and high-ranking Department of Justice officials. *See* Br. Amici Curiae 4. The correct legal analysis was that employed by the District Court: the three-part test of *Solem v. Helm*, 463 U.S. 277 (1983), and *Harmelin v. Michigan*, 501 U.S. 957 (1991). After careful analysis, each of the *Solem-Harmelin* factors "lead to the conclusion that Mr. Angelos' sentence violates the Eighth Amendment." Pet. App. 92-93. Only this Court's decision in *Hutto v. Davis*, 454 U.S. 370 (1982) (*per curiam*), prevented a ruling that Petitioner's sentence violates the Eighth Amendment. Pet. App. 93-94. The issue, then, is whether *per curiam* decisions like *Davis* have such preclusive effects.

II. The Precedential Value Of *Hutto v. Davis* And *Per Curiam* Opinions Generally Is The Key Issue In This Case.

When viewed through the proper analysis, *Hutto v. Davis* is at the very center of this case. As detailed in the petition, the lower courts were incorrect to believe that *Davis* foreclosed Petitioner's Eighth Amendment challenge. *Davis* is of uncertain precedential value given its status as a summary disposition by *per curiam* opinion; it is also clearly distinguishable from the present case and has been effectively overruled by subsequent decisions. Pet. 4-24; *see also* Br. Amici Curiae 1-11. The District Court recognized that

Davis was of questionable precedential value but cannot be disregarded until the Supreme Court decides as much. Pet. App. 93-94. This case offers the Court just such an opportunity to provide clarity to the lower courts.

As detailed in the petition, the Court has vacillated over the years in its treatment of summary dispositions by *per curiam* opinion. Sometimes these opinions are regarded as fully binding and controlling precedents, but at other times they are deemed to be of lesser precedential value; and because such summary dispositions do not themselves seek to explain the *raison d'être* of this type of opinion, little guidance has been provided as to their value and proper application. *See* Pet. 8-16. Members of this Court have recognized that summary dispositions by *per curiam* opinion carry "a great risk of rendering erroneous or ill-advised decisions that may confuse the lower courts." *Harris v. Rivera*, 454 U.S. 339, 349 (1981) (Marshall, J., dissenting); *see also Lehman v. Trout*, 465 U.S. 1056, 1062 (1984) (Stevens, J., dissenting). The petition described how this concern has, in fact, come to fruition in various cases, with the lower courts reaching different conclusions in their interpretation and application of summary dispositions, sometimes rectified only through plenary consideration of this Court. *See* Pet. 17-20.[7]

While some lower court decisions have concluded that *per curiam* opinions are to be narrowly interpreted and are of limited precedential value, *see, e.g., In re Kandu*, 315 B.R. 123, 138 (W.D. Wash. 2004); the lower courts in this case accorded the summary disposition in *Hutto v. Davis* the same value and interpretive breadth as Supreme Court decisions rendered after plenary review, full briefing, and oral argument. As detailed in the petition, confusion over the value and application of summary dispositions in general, as well as the lack of detailed analysis in *Davis* and the failure of the lower courts to recognize its underlying purpose (i.e.,

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[7] In addition to those referred to in the petition, many other lower court decisions have expressed confusion over the meaning of the Supreme Court's *per curiam* opinions. *See, e.g., Campbell v. Wood*, 20 F.3d 1050 (9th Cir. 1994) (*en banc* opinions expressing disagreement over meaning of *In re Blodgett*, 502 U.S. 236 (1992) (*per curiam*)).

enforcing a previous remand), muddled an otherwise clear result under the Court's Eighth Amendment standard. *See* Pet. 20-24. The current case thus provides an excellent vehicle to offer guidance on the application and precedential value of summary dispositions on the merits.

III. The Government's Efforts To Avoid *Davis* Fall Flat.

In its attempt to avoid the central question presented by this case, the Government contends that Petitioner has failed to distinguish this case from previous Supreme Court and lower court decisions. Br. in Opp. 15-16. Such an assertion is easily countered.

Petitioner is a first-time offender, while all but one of the Court's decisions relied on by the Government involved recidivists. *See Ewing v. California*, 538 U.S. 11 (2003); *Lockyer v. Andrade*, 538 U.S. 63 (2003); *Rummel v. Estelle*, 445 U.S. 263 (1980); *Davis*, 454 U.S. at 380 n.10 (Powell, J., concurring in the judgment). Moreover, the one exception, *Harmelin v. Michigan*, 501 U.S. 957 (1991), is distinguishable. Not only was *Harmelin* a deeply divided decision without a clear majority – producing five separate opinions and a lead opinion that represented the views of only two Members of the Court in 33 of its 36 pages, *see id.* at 961-94 (opinion of Scalia, J., joined by Rehnquist, C.J.) – but the case involved a large amount of an addictive and possibly lethal drug, cocaine, that had "a potential yield of between 32,500 and 65,000 doses." *Id.* at 1002 (Kennedy, J., concurring). There was thus "good reason [to] conclude that [Harmelin's] crime is more serious than the crime in *Davis*," *id.* at 1004 – as well as the crimes in the present case, which involved "small amounts of marijuana" worth a few hundred dollars. Pet. App. 90. Petitioner's offense does not compare to the crime in *Harmelin*.[8]

[8] It might be noted that marijuana has been decriminalized in a number of jurisdictions and is deemed a minor offense in others. *See, e.g.*, COLO. REV. STAT. § 18-18-406(1) (making possession of less than one ounce of marijuana a petty offense subject to $100 fine); 22 ME. REV. STAT. § 2383(1)(A) (making

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In addition, each of the lower court cases cited in the response involved armed robberies. Br. in Opp. 16 (citing *United States v. Hungerford*, No. 05-30500, 2006 WL 2923703 (9th Cir. Oct. 13, 2006); *United States v. Beverly*, 369 F.3d 516 (6th Cir. 2004); *United States v. Arrington*, 159 F.3d 1069 (7th Cir. 1998); *United States v. Harris*, 154 F.3d 1082 (9th Cir. 1998). Armed robberies are "extremely dangerous" and "undeniably violent" crimes where harm is threatened and occasionally caused. *Harris*, 154 F.3d at 1084. These are simply not applicable to Petitioner's case. Ironically, however, the Government's general point – that the courts have "rejected Eighth Amendment challenges to lengthy prison sentences," Br. in Opp. 16 – provides a strong reason for this Court to grant the petition in the present case. Some lower courts now misunderstand the Supreme Court's Eighth Amendment jurisprudence as standing for the proposition that a term of imprisonment can *never* be unconstitutional.[9]

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possession of usable amount of marijuana a civil violation subject to fine of $350-$600); NEB. REV. STAT. § 28-416(13)(a) (making possession of less than one ounce of marijuana an infraction subject to a citation); N.Y. PENAL LAW § 221.05 (making possession of up to 25 grams of marijuana a civil violation subject to a $100 fine). Moreover, the federal government itself treats marijuana as less harmful than cocaine and other more serious drugs under congressional statutes and the Sentencing Guidelines. *Compare* 21 U.S.C. § 841(b)(1)(A)-(C) (punishment for, *inter alia*, heroin and cocaine) *with* 21 U.S.C. § 841(b)(1)(D) (punishment for marijuana). "Although drug crimes generally are considered serious," a federal appellate court argued in 2001, "we believe that it denies reality and contradicts precedent to say that all drug crimes are of equal seriousness and pose the same threat to society." *Henderson v. Norris*, 258 F.3d 706, 709 (8th Cir. 2001).

[9] *See, e.g., Beverly*, 369 F.3d at 537 ("The Supreme Court has never held that a sentence to a specific term of years, even if it might turn out to be more than the reasonable life expectancy of the defendant, constitutes cruel and unusual punishment. *See Harmelin*, 501 U.S. at 996. In the absence of such guidance, we see no principle on which such a result could be based, and we decline to establish such a principle here."); *Hungerford*, 2006 WL 2923703, at n.4 (Reinhardt, J., concurring) ("We are foreclosed from holding the sentence to be in violation of the cruel and unusual punishment clause because of its severity by *Harmelin* and *Ewing*"); *Harris*, 154 F.3d at 1085-86 (Noonan, J., concurring) ("In the present climate, Congress's attempt to control crime by escalating the punishments has gone very far in the direction of eliminating the prudential, proportionate judgment of the

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As stated by a Member of the Court and reiterated by a lower court, "[i]n too many cases, mandatory minimum sentences are unwise and unjust." *Hungerford*, 2006 WL 2923703, at *7 (Reinhardt, J., concurring) (quoting Hon. Anthony M. Kennedy, Associate Justice, Supreme Court of the United States, Speech at the American Bar Association Annual Meeting (Aug. 9, 2003)). This is precisely the situation here – an "unjust, cruel, and even irrational" sentence, Pet. App. 33, 102 – resulting in an extraordinary case of grossly disproportionate punishment, *see* Pet. 27-29; Pet. App. 63-69 (noting far lower sentences for far more severe crimes); that, but for the Court's decision in *Davis*, would have been deemed unconstitutional. Given the uncertain status of summary dispositions by *per curiam* opinion, as illustrated by *Davis* and its application in the present case, and the confusion over proper Eighth Amendment analysis, echoed by Amici Curiae, this case offers an excellent vehicle to clarify the law and provide guidance to the lower courts.

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For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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sentencing judge. The effect has been magnified by the deference accorded the legislature by the decisions of the Supreme Court.").